Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JACQUELINE E. CAMPER,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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July, 2000

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QUESTIONS PRESENTED FOR REVIEW

1. When is an unlawful employment practice established in a Title VII claim for retaliation when the Civil Rights Act of 1991 does not provide for retaliation as a factor?

2. Should the Court review and revise existing evidentiary burdens upon an employee in a Title VII claim for retaliation when mixed motives are shown in evidence for the employer's actions against the employee?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacqueline E. Camper, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals For The Sixth Circuit filed April 11, 2000.

OPINIONS BELOW

The Opinion of the United States Court of Appeals For The Sixth Circuit on which the writ of certiorari is sought is unreported and is reproduced as Appendix E to this Petition. The Opinions of the United States District Court For The Western District of Tennessee granting summary judgment in favor of the Respondent and denying Petitioner's Rule 59 motion are likewise unreported and are reproduced as Appendix A and Appendix D to this Petition.

JURISDICTION

The Opinion of the Court of Appeals was entered on April 11, 2000; (Appendix A). This Petition is filed and submitted within 90 days of that Opinion. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) and Rules 10 and 14 of the Court.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000e-2

(a) Employer practices. It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2 (m)

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. 2000e-3 (a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

STATEMENT OF THE CASE

The Title VII claim of Jacqueline E. Camper in this case is based upon her Complaint for retaliation in conjunction with the filing of her initial internal EEO claim of unlawful discrimination within Federal Express Corporation and the retaliatory actions by her employer involving a period of approximately one year. Petitioner, Jacqueline E. Camper, was a regular full-time employee of the Respondent, Federal Express Corporation, from March 1, 1976 through November 12, 1996 when the Respondent terminated her as its employee. The pattern and course of hostility and retaliation against Petitioner was highlighted in her internal EEO claim resulting from a nasty sexual

remark that Ms. Camper's supervisor made to her. Increasingly intense, retaliatory and grossly derrogatory performance reviews were also placed in Ms. Camper's employment record by her supervisor as a retaliatory prelude for ultimately having Petitioner fired. Petitioner refused to sign and assent to one such false "Performance Reminder" resulting in threats, coercion and duress from Respondent's Managing Director of Public Relations to have a security guard take her employment identification from her and escort her out of the building where Petitioner worked for Federal Express Corporation. Respondent created and maintained a hostile retaliatory work environment for Petitioner which developed into an employment file that is quite adverse concerning her level of performance. The Petitioner ultimately filed two charges of discrimination with the U.S. Equal Employment Opportunity Commission at Memphis, Tennessee.

Petititioner's Complaint for retaliation was timely filed and Petitioner's claim of Retaliation is the sole and only claim for which she filed a Complaint. Summary Judgment was granted to the Respondent in this case that was affirmed by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. What is the requisite level of proof necessary for a Plaintiff to provide under existing law to establish retaliation in a Title VII case? The Civil Rights Act of1991 does not provide for what evidence, or level of evidence, is required to establish a claim for retaliation. Only race, color, religion, sex, or national origin are set forth in 42 U.S.C 2000e-2 (m) as "motivating factors" for any unlawful employment practice. As a result, only an inference of discrimination need only be provided by a Plaintif charging

retaliation when the reason advanced by the employer can only be completely true, or patently false. The dicotomy within this type framework can only accept one of these reasons being true as opposed to the other such reason. Retaliation, however, need only be one factor leading to a Plaintiff's discharge to be actionable; **Heywood v. Samaritan Health System, 902 F. Supp. 1076, (D.C. Ariz. 1995); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993); Distasio v. Perkins Elmer Corp., 157 F.3d 55 (2d Cir. 1998).** When that is so, a Plaintiff should be able to submit their case to a jury for decision about which of the opposing reasons is really true in such a retaliatory atmosphere. The issue of pretext turns on credibility alone; **Jackson v. University of Pittsburg, 826 F.2d 230, 236 (3d Cir. 1987).** If an employer creates such a miserable retaliatory working atmosphere for an employee, causing that employee's performance to suffer, the employer should not be able to escape liability in

summary judgment when her work record is based upon those harsh and retaliatory conditions; **Lamb v. DrilcoDiv., 32 Fair Empl. Pract. Cas., 105, 107 (S.D.Tex. 1983); Weiss v. United States, 595 F.Supp. 1050 (E.D. Va. 1984); Moffett v. Gene B. Glick Co., 621 F.Supp. 244, 281 (D.C. Ind. 1985); Crado v. Concordia College, 724 F.Supp. 558, 567 (N.D. Ill. 1989).**

2. The Court of Appeals relied upon its case of **Manzer v. Diamond Shamrock Chem. Co., 29 F. 3d 1078 (6th Cir. 1994)** in citing the requisite level of evidence needed by a Plaintiff to survive the defending employer's motion for Summary Judgment. That case follows this Court's ruling in **St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed. 2d 407, 113 S.Ct. 2742.** The question presented in **Hicks (p. 511)** was whether a finding of pretext required, or merely allowed, the trier of

fact to infer discriminatory intent. The dissenting opinion notes that an employer can win by simply proving a lie; **Hicks, pp. 535-537, 540.** When retaliation is the issue and mixed motives appear of record for the employee's termination, that record will also mask the pretext advanced by the employer for its adverse employment actions. Under existing law, the burden for an employee to prove a prohibited motive on the part of the employer is exceedingly high. An employer is certainly better advised than an employee, and it creates and controls virtually all of the relevant documents, and employs most of the potential witnesses. This burden is even greater for what might be viewed of record as an imperfect employee for which the employer has created quite an array of less than favorable write-ups. While the law protects the imperfect employee as well as the perfect employee from retaliation, the burden placed upon the former to prove retaliation is so overwhelming as to virtually be unattainable. The problems

of proof for such an employee are further magnified when employers and their supervisors are reasonably well educated about employment laws, reasonably cautious in avoiding statements evidencing bad motives, but quite prompt and eager to document an employee's "shortcomings". The careful and liability conscious employer has means, motive and opportunity to create a plausible record to support what will actually be an illegally motivated discharge. The Court should revise and modify **Hicks** to provide that summary judgment is inappropriate whenever the plaintiff raises a factual dispute as to pretext in a claim for retaliation. Human motivations are typically complex, and a complete understanding of the causation of human decisions is elusive. *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Tex. Law Rev. 17 (1991).*

Inferences may be all that an employee-plaintiff will even have available to present to a court. Why should a single fact-finder, instead of a jury, be allowed to decide which of the parties' inferences is true?

CONCLUSION

The overwhelming burden needed by a Title VII Plaintiff to currently prevail in a case for retaliation should be revised in a mixed motives case when the Civil Rights Act of 1991 does not provide for the establishment of retaliation as a motivating factor. Petitioner earnestly submits that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for The Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ORDER GRANTING
SUMMARY JUDGMENT

Filed October 9, 1998

Pages A-1 thru A-11

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACQUELINE E. CAMPER,	)	
Plaintiff,	)	
v	)	No.97-2649 MI/Bre
FEDERAL EXPRESS CORP.,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Defendant filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56 on September 9, 1998. For the reasons set forth below, Defendant's motion is GRANTED.

Background

Plaintiff, an African American female, was a long-term employee of Defendant. In April, 1995, Plaintiff was transferred to the work group headed by Myron Lowery, an African American male, pursuant to a corporate reorganization. Lowery was Plaintiff's immediate supervisor. Plaintiff's job responsibilities included handling reservations for the Quality Forums, maintaining the accounting and bookkeeping for the money sent to the Quality Forum, and performing escorting and logistics duties. On November 6, 1995, Plaintiff received a

Memorandum from Lowery reminding her that she had been arriving late for work; Lowery advised Plaintiff that she could not work past 6 p.m. without prior authorization.[1] On November 27, 1995, Plaintiff received a Suggested Action Planner from Lowery to help improve her performance. On May 29, 1996, Plaintiff received a memorandum from Lowery regarding performance improvement counseling. The memorandum mentioned Plaintiff's failure to turn in weekly reports, activity reports, revenue reports, and Quality Form surveys on time, and her habit of arriving late in the morning and taking extremely long lunch breaks. Lowery ordered a counseling session for Plaintiff. On July 10, 1996, Plaintiff received a Performance Reminder from Lowery stating that there had been no improvement since the counseling session. Lowery also observed a number of work-related deficiencies. On July 12, 1996 Plaintiff received another action planner from Lowery recommending that she improve her job performance. On July 17, 1996, Lowery issued Plaintiff another Performance Reminder because Plaintiff continued to take long lunch breaks. On October 2, 1996, Plaintiff received a Performance Review rating of 1.6 out of a possible 4.0. Federal Express had a policy (Performance

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[1]In his deposition, Lowery stated that Plaintiff would work past 6 p.m. and then request compensatory time, even though Lowery felt that Plaintiff could and should perform her job duties during normal business hours.

Improvement Policy 2-50) which states that "[t]hree unsatisfactory performance reviews, three performance reminders or a combination of any type of notification (including warning letters for misconduct) totaling three (normally within an 18 month period) normally result in termination." It is undisputed that, under this policy, Plaintiff's employment normally would have been terminated as of October 2, 1996.

Plaintiff filed an EEOC charge of race discrimination with the EEOC on October 28, 1996. On November 1, 1996, Lowery came to Plaintiff's cubicle, and, without speaking, scowled more fiercely than he had ever scowled at her before.[2] On November 5, 1996, Lowery suspended Plaintiff without pay for her failure to follow the July 12, 1996, action planner, and specifically for her failure to turn in revenue on a weekly basis. On November 11, 1996, Lowery terminated Plaintiff pursuant to Defendant's policy 2-50. In the letter terminating Plaintiff, Lowery stated that even though Plaintiff could have been terminated a month earlier, Plaintiff was "given additional time to correct the problem ... Based on the most

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[2]"This to me was the scowl of scowls. If you put this scowl in line with the rest of the scowls (Lowery had previously given Plaintiff), this scowl would win hands down every single time, every single time. If body language could speak, this would be Frederick Douglas, you know, and he was a great orator." Pla. Dep at 428.

recent deficiencies which show a recurrent pattern, termination is warranted."

Many of Plaintiff's factual allegations concentrate upon Lowery's alleged lack of management skills, which is quite apart from a Title VII analysis. The issue in the case is not whether Defendant employed a poor manager; it is whether Defendant violated Title VII. Title VII does not impose liability for simple, run-of-the-mill, non-discriminatory personality conflicts or supervisor-employee work disputes. Thus, for instance, evidence adduced by Plaintiff that Lowery received poor reviews from his subordinates in 1995, or that Lowery was new to management when Plaintiff joined his working group, or that Lowery may have had a bad temper, see Pla.'s Reply at ¶¶ 1-7, 11, is irrelevant to the case at hand.

Likewise, most if not all, of the testimony elicited from Plaintiff's former colleagues in a different department[3] is simply not relevant to the case at bar. In addition, most of deposition testimony of Plaintiff's former

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[3]Plaintiff transferred from Ms. Carolyn Freeman's, Ms. Regina Taylor's and Ms. Lisa Daniel's department to Lowery's work group in 1995. A deposition of a Ms. Howard was also quoted by Plaintiff in her response; however, Ms. Howard's deposition has not been supplied to the Court, nor has she been adequately identified. Based on other portion's of Plaintiff's memorandum, the Court concludes that she was not in Plaintiff's working group. See Pla.'s Mem. at ¶¶ 7 and 27.

colleagues is not based on personal knowledge and, thus, is inadmissible under Fed R. Civ. P. 56(e).

Standard for Summary Judgment

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. p. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of demonstrating the absence of a genuine issue of material fact," id. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. See Emmons V. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

When confronted with a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists "if the evidence (presented by the nonmoving party]." is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether

the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

Analysis

Title VII of the Civil Right's Act of 1964 provides in relevant part:

> It shall be unlawful employment practice for an employer to discriminate against any of his [or her] employees or applicants for employment ... because [he or she] has made a charge, testified, assisted or participated in any matter in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. 2000e-3(a).

In bringing an employment discrimination claim, the first step for a plaintiff is to establish a prima facie case of discrimination. The burden of proof to establish a prima facie case lies exclusively with the plaintiff. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502-03, 508-10 n. 3 (1993). Plaintiff can establish a prima facie case by direct or indirect evidence. In the absence of direct evidence of discrimination, the plaintiff may meet her burden by demonstrating inferentially that she was a victim of intentional discrimination. See McDonnell Douglas, 411 U.S. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

To establish a prima facie claim of retaliation, Plaintiff in this case must show that (1) she engaged in activity protected by Title VII; (2) her exercise of civil rights was known by the Defendant; (3) thereafter, Defendant took employment action adverse to Plaintiff; and (4) there was a causal connection between the protected activity and the employment action. Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987); Canitia v. Yellow Freight Sys., Inc., 903 F.2d 1064f 1066 (6th Cir.), cert. denied, 498 U.S. 484 (1990).

In order to satisfy the causal-link element of the prima facie case requirement, a plaintiff must produce evidence "sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." Zanders v. National R.R. Passengers Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (quotation omitted). The mere fact that a plaintiff suffers an adverse employment action subsequent to participating in protected activity is insufficient to establish the fourth element of the prima facie case requirement. See Cooper v. City of North Olmsted, 795 F.2d 1265, 1272-73 (6th Cir. 1986).

In this case, there is no question that Plaintiff engaged in protected activity and that she suffered an adverse employment action. Plaintiff's difficulties in establishing a prima facie case lie in demonstrating: (1) that there was a causal connection between the protected activity and the termination; and (2) that her exercise of civil rights was known by the Defendant.

With regard to the causal link between the protected activity and Plaintiff's termination, Plaintiff depends upon the timing to establish a causal link. The charge was filed on October 28, 1996 and Plaintiff was terminated on November 11, 1996. Plaintiff must raise an inference that a discriminatory reason was the likely reason for the adverse action. The short time frame between the two actions is sufficient to meet Plaintiff's prima facie burden.

As to the question of Defendant's knowledge, Plaintiff relies on a single episode, a harsher degree of scowl from Lowery than was typical from him directed at Plaintiff on November 1, 1996, in order to substantiate her argument that Defendant knew of her protected activity. This is a slender reed. Plaintiff bases her entire argument regarding Defendant's knowledge on a different order of magnitude of a scowl. Plaintiff admits that Lowery had given her glares before the protected activity. The Court finds that, even under the relatively easy burden which must be overcome to demonstrate a prima facie case, Plaintiff's interpretation of the severity of a scowl is insufficient evidence to meet the burden. Plaintiff has not sufficiently demonstrated that Defendant had knowledge of her protected activity.

Even assuming, arguendo, that Plaintiff had established a prima facie case of discrimination, this does not automatically save a plaintiff from a summary judgment motion. If a plaintiff has demonstrated a prima facie case of retaliation or failure to promote, the burden of

production, not persuasion, shifts to the defendant to articulate a legitimate non-discriminatory reason for its action. See Burdine, 450 U.S. at 254; Wrenn, 808 F.2d at 501. By producing evidence (whether ultimately persuasive or not) of non-discriminatory reasons, the defendant can sustain its burden of production. See St. Mary's Honor Ctr., 509 U.S. at 508-10. Defendant is not required to prove the absence of a discriminatory motive. See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 (1978).

Defendant has offered a litany of work infractions over the eighteen months prior to Plaintiff's termination. Whether each and every infraction is undisputed is immaterial. What matters is that the work infractions, memorialized in writing roughly contemporaneously with their occurrence, act in toto to provide a legitimate, non-discriminatory reason for firing Plaintiff. Defendant's termination policy directing termination if certain conditions are met buttresses Defendant's proffered non-discriminatory reason for terminating Plaintiff.

Once the employer has come forward with a non-discriminatory reason for the adverse employment action, the presumption of discrimination is rebutted, and the plaintiff must produce sufficient evidence from which the fact-finder may reasonably reject the employer's explanation. See Burdine, 450 U.S. at 255-56; Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir.1994).

Evidence sufficient to permit a reasonable jury to conclude that the defendant's proffered reason was not its true reason and instead was pretextual, together with evidence sufficient to establish the elements of the prima facie case, is sufficient to create a jury question as to the "ultimate fact" of unlawful retaliation or failure to promote. See St. Mary's Honor Ctr., 509 U.S. at 511; EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 834 6th Cir. 1997). A plaintiff may show pretext by demonstrating that: (1) the proffered reason had no basis in fact; (2) the proffered reason did not actually motivate the adverse employment action; or (3) 10 the proffered reason was insufficient to motivate the adverse employment action. See Yenkin-Majestic, 112 F.3d at 834 (citing Manzer, 29 F.3d at 1084). A plaintiff's conjecture or personal belief that he or she has been discriminated against does not constitute proof. Chappell v. GTE, 803 F.2d 261, 268 (6th Cir. 1986).

Plaintiff has failed to show that Defendant's reason for firing Plaintiff was pretextual. All of the evidence regarding Plaintiff's work infractions relates to a time period before she filed her initial EEOC charge; therefore, a reasonable juror could not find that Plaintiff established a causal link between this activity and Plaintiff's discrimination charge.

As for the actual decision to terminate, Lowery followed Defendant's written policy regarding termination. He only deviated from the policy to allow a grace period

for Plaintiff to improve her job performance. It was only during that grace period that Plaintiff filed her EEOC charge. Plaintiff has not offered an iota of proof that Defendant treated Plaintiff differently from any other of Defendant's employees who had garnered sufficient demerits to be subject to Defendant's policy 2-50. The Court does not find that Lowery's month long delay in implementing Defendant's clear policy evidences pretext. Rather, the Court finds that the process leading to the decision to terminate Plaintiff was coincidental to the filling of the EEOC charge and that there was no correlation between the filing of the charge and the termination of Plaintiff.

Conclusion

For the reasons set forth above, the Court GRANTS Defendant's motion for summary judgment in its entirety.

IT IS SO ORDERED this 9 day of October, 1998.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

Filed October 9, 1998

Pages B-1 thru B-1

B-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACQUELINE E. CAMPER JUDGMENT IN A CIVIL CASE

VS.

FEDERAL EXPRESS CORP. CASE NO: 97-2649 MI/Bre

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Order Granting Defendant's Motion for Summary Judgment filed October 9, 1998, this case is DISMISSED.

APPROVED:
/s/ Jon Phipps McCalla
JON PHIPPS MCCALLA
UNITED STATES DISTRICT COURT

Oct. 9, 1998
Date

ROBERT R. DI TROLIO
Clerk of Court
/s/ Betty A. Guy
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MOTION TO ALTER, AMEND OR SET ASIDE JUDGMENT

Filed October 22, 1998

Pages C-1 thru C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACQUELINE E. CAMPER,
Plaintiff,

v. No. 97-2649-M

FEDERAL EXPRESS CORP.,
Defendant,

MOTION OF PLAINTIFF TO ALTER, AMEND AND SET ASIDE ORDER AND JUDGMENT GRANTING SUMMARY JUDGMENT AND TO CORRECT TYPOGRAPHICAL SECTIONS OF HER REPLY

Comes the Plaintiff, Jacqueline E. Camper, and moves the court to alter, amend and set aside the Court's Order and Judgment entered October 13, 1998 granting Summary Judgment against her, and to also correct typographical errors in sections of her Reply with respect to the name of a Deposition Witness, Carolyn Howard. For the reasons, and upon the basis and authorities set forth in her initial Memorandum and the Memorandum being filed with this Motion, the court should granted the relief sought herein by her and enter a new scheduling Order for this action.

Respectfully submitted,
/s/ Sam F. Cole, Jr.
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Tel. 901-525-7648
Attorney for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ORDER DENYING PLAINTIFF'S
MOTION FOR RELIEF FROM JUDGMENT

Filed January 5, 1999

Pages D-1 thru D-6

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACQUELINE E. CAMPER,	)	
Plaintiff,	)	
v	)	No.97-2649 MI/Bre
FEDERAL EXPRESS CORP.,	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION
FOR RELIEF FROM JUDGMENT

Plaintiff filed a motion for relief from judgment in this case. For the reasons set forth below, the Court DENIES Plaintiff's motion.

BACKGROUND

Plaintiff, an African American female, was a long-term employee of Defendant. In April, 1995, Plaintiff was transferred to the work group headed by Myron Lowery, an African American male pursuant to a corporate reorganization. Lowery was Plaintiff's immediate supervisor. Plaintiff's job responsibilities included handling reservations for the Quality Forums, maintaining the accounting and bookkeeping for the money sent to the Quality Forum, and performing escorting and logistics duties. On November 6, 1995, Plaintiff received a

Memorandum from Lowery reminding her that she had been arriving late for work; Lowery advised Plaintiff that she could not work past 6 p.m. without prior authorization. On November 27, 1995, Plaintiff received a Suggested Action Planner from Lowery to help improve her performance. On May 29, 1996, Plaintiff received a memorandum from Lowery regarding performance improvement counseling. The memorandum mentioned Plaintiff's failure to turn in weekly reports, activity reports, revenue reports, and Quality Form surveys on time, and her habit of arriving late in the morning and taking extremely long lunch breaks. Lowery ordered a counseling session for Plaintiff. On July 10, 1996, Plaintiff received a Performance Reminder from Lowery stating that there had been no improvement since the counseling session. Lowery also observed a number of work-related deficiencies. On July 12, 1996, Plaintiff received another action planner from Lowery recommending that she improve her job performance. On July 17, 1996, Lowery issued Plaintiff another Performance Reminder because Plaintiff continued to take long lunch breaks. On October 2, 1996, Plaintiff received a Performance Review rating of 1.6 out of a possible 4.0. Federal Express had a policy (Performance Improvement Policy 2-50) which states that "[t]hree unsatisfactory performance reviews, three performance reminders or a combination of any type of notification (including warning letters for misconduct) totaling three (normally within an 18 month period) normally result in

termination." It is undisputed that, under this policy, Plaintiff's employment normally would have been terminated as of October 2, 1996.

Plaintiff filed a charge of race discrimination with the EEOC on October 28, 1996. On November 1, 1996, Lowery came to Plaintiff's cubicle, and, without speaking, scowled more fiercely than he had ever scowled at her before. On November 5, 1996, Lowery suspended Plaintiff without pay for her failure to follow July 12, 1996, action planner, and specifically for her failure to turn in revenue on a weekly basis. On November 11, 1996, Lowery terminated Plaintiff pursuant to Defendant's policy 2-50. In the letter terminating Plaintiff, Lowery stated that even though Plaintiff could have been terminated a month earlier, Plaintiff was "given additional time to correct the problem Based on the most recent deficiencies which show a recurrent pattern, termination is warranted."

STANDARD

Entry of judgment in this case occurred on October 9, 1998. Plaintiff filed her motion to alter or amend judgment October 22, 1999. As the motion was filed more than ten days after entry of judgment, the Court considers the motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). See also Fed. R. Civ. P 59(e).

The standard for granting a Rule 60 motion is significantly higher than the standard applicable to

> a Rule 59 motion .... A timely Rule 59 motion may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed. R. Civ. P. 59(a). A Rule 60(b) motion, by contrast, may be granted only for certain specified reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
>
> Fed. R. Civ. P. 60(b).

Feathers v. Chevron U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998).

DISCUSSION

Plaintiff first alleges error in the Court's finding that the testimony elicited from Plaintiff's former colleagues was not relevant and not based on personal knowledge. The Court finds that this is not a recognized reason under Rule 60(b) to grant Plaintiff's motion.[1] Plaintiff next argues that the Court applied the wrong standard of analysis to Plaintiff's evidence. The Court again finds that this is not a recognized reason under Rule 60(b) to grant Plaintiff's motion.

The court finds no other argument made by Plaintiff in its motion which could possibly lead to the granting of Rule 60(b) motion.

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[1]The Court has reviewed the testimony cited in Plaintiff's response to Defendant's summary judgment motion, set forth in paragraphs 3, 5, and 23-51, notwithstanding the fact that the Court had no need to do so. The Court again finds that none of the cited testimony provides relevant admissible direct or indirect evidence of discrimination which was not discussed in the Court's order of October 9, 1998.

CONCLUSION

For the reasons set forth above, the Court finds that Plaintiff has set forth no reason for granting its motion for relief from judgment pursuant to Rule 60(b). Therefore, the Court DENIES Plaintiff's motion for relief from judgment.

SO ORDERED this 4 day of Jan. 1999.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Filed April 11, 2000

Pages E-1 thru E-4

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
No. 99-5185
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE E. CAMPER,	)	
	)	ON APPEAL FROM THE
Plaintiff-Appellant,	)	UNITED STATES DISTRICT
	)	COURT FOR THE WESTERN
v.	)	DISTRICT OF TENNESSEE
	)	AT MEMPHIS
FEDERAL EXPRESS CORP.,	)	
	)	**OPINION**
Defendant-Appellee.	)	

Before RYAN, MOORE, and FARRIS[1], Circuit Judges.
JEROME FARRIS, Circuit Judge.

Jacqueline E. Camper Appeals the district court's order granting summary judgment in favor of Federal Express Corporation in her Title VII action alleging retaliation for filing a discrimination complaint with the Equal Employment Opportunity Commission. Camper also appeals the district court's order denying her motion for reconsideration under Federal Rule of Civil Procedure

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[1]The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

60(d). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Because Camper brought her motion for reconsideration within 10- days of entry of judgment, the district court improperly construed Camper's motion as one brought under Rule 60(b), rather than Rule 59(e). *See* Fed. R. Civ. P. 6, 59(b). Camper's post-judgment tolling motion was timely, and thus the thirty day appeal period for the underlying judgment was tolled until the district court ruled on Camper's motion for relief from judgment, *See* fed. R. App. R. 4(a)(4)(A)(iv). The district court's underlying judgment and order denying reconsideration are reviewable.

A district court's order granting summary judgment is reviewed de novo. *See Allen v. Michigan Dep't of Corrections*, 165 F.3d 405, 409 (6th Cir. 1999). We employ the *McDonnell Douglas* burden-shifting analysis to determine whether a plaintiff can prove retaliation under Title VII. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).

This district court held that Camper failed to demonstrate the elements of a prima facie case. See *Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) (reiterating that the prima facie elements of retaliation are: the plaintiff engaged in protected activity, the defendant knew of the protected activity, the defendant took an adverse employment action thereafter, and there was a causal connection between the protected activity and the adverse employment action).

Assuming, *arguendo*, that Camper can establish a prima facie case of retaliatory treatment, she has failed to make a showing that there is any genuine issue of fact that Lowery's decision to terminate her employment was merely a pretext for retaliating against her for filing the EEOC complaint. *See Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (Holding that the "plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation"). Therefore, she cannot sustain her claim for retaliatory discharge, and the district court properly granted summary judgment in favor of Federal Express.

While we generally review the denial of a motion to alter or amend judgment under FRCP 59(e) for an abuse of discretion, we apply a de novo standard of review when the Rule 59(e) motion seeks review of a grant of summary judgment.[1] *See Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 289 (6th Cir. 1999); Columbia Gas Transmission, Corp. v. Limited Corp., 951 F.2d 110, 112 (6th Cir. 1991) (applying de novo standard of review to Rule 59(e) motion seeking reconsideration of a grant of summary judgment).

Camper has not shown an intervening change ;in controlling law, newly discovered evidence, or any manifest

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[1]Because the appropriate standard in reviewing the district court's denial of reconsideration under FRCP 59(e) is de novo, it is harmless error that the district court improperly used a different standard of review in its denial.

injustice. *See Gencorp, Inc., v. American Int'l Underwriters*, 178 F.3d 804, 833 (6th Cir. 1999). She therefore is not entitled to relief from judgment under Rule 59(e).

AFFIRMED.